

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )	
FOR CHANGE OF APPROPRIATION WATER )	FINAL ORDER
RIGHT G(W)194810-43B BY RONALD AND )	
DONNA DODSON )	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the February 18, 1993, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Change of Appropriation Water Right G(W)194810-43B by Ronald and Donna Dodson is hereby denied.

NOTICE


The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for

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certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 19 day of March, 1993.

  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605


CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 22<sup>nd</sup> day of March, 1993 as follows:

Ronald and Donna Dodson  
P.O. Box 22  
Gardiner, MT 59030

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301

Scott Compton, Manager  
Bozeman Water Resources  
Regional Office  
111 N. Tracy  
Bozeman, MT 59715  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR CHANGE OF APPROPRIATION WATER       )       PROPOSAL FOR DECISION  
RIGHT G(W)194810-43B BY RONALD AND       )  
DONNA DODSON                               )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 21, 1993, in Livingston, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Ronald and Donna Dodson under the criteria set forth in Mont. Code Ann. § 85-2-402(1) (1989).

APPEARANCES

Applicants Ronald and Donna Dodson appeared at the hearing by and through Ronald Dodson.

John Orser, appeared at the hearing and was called as a witness by the Department.

Scott Compton, Manager of the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Cindy G. Campbell, Hearings Unit Legal Secretary, appeared at the hearing.

Objector Donald E. Creek withdrew his objection on November 25, 1992 and is no longer a party to this case.

EXHIBITS

No exhibits were offered for inclusion into the record.

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**FILME**

MAY 27 1993

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is entered into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-402(1) (1989), states in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. On May 21, 1990, Applicants filed an Application for Change of Appropriation Water Right to change the purpose of use of Statement of Claim 194810-43B from industrial to domestic use. (Department file.)

3. Pertinent portions of the Application were published in the *Livingston Enterprise* on July 3, 1990. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. The Department received one objection to the Application and notified Applicants of this objection by a letter dated July 26, 1990. (Department file.)

4. Applicants proposed, in their Application, to use the waters of Eagle Creek for domestic lawn and garden irrigation at a rate of 30 gallons per minute up to 2.5 acre-feet per year. The proposed point of diversion is in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24 and the proposed place of use is in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24, Township 9 South, Range 8 East, in Park County, Montana. Applicants had used the water in this manner for some time before they were made aware that a change authorization was necessary. During the hearing, Mr. Dodson stated a well had been installed to serve the domestic needs in the house and that the change would be for use on the lawn and garden, approximately 1.00 acre.

5. During the hearing Mr. Dodson stated his pump could only produce a flow rate of 10 gallons per minute and although he had originally considered buying a larger pump, he now thought the smaller pump would be adequate.

6. Mr. John Orser, previous owner of the Applicants' property, bought the property in 1964. There was an old ditch on the property and Mr. Orser began to use it to irrigate some newly planted trees. However, a downstream user brought suit against Mr. Orser for using that water. Mr. Orser then purchased the first water right on Eagle Creek and a first right on Bear Creek from Dan Bigelow. He used this water from Eagle Creek and Bear Creek to irrigate approximately 90 acres in 1965 and continuously thereafter. In the early 1970's, Mr. Orser decided to open a travertine rock sawing plant so he constructed a dam on Eagle

Creek. When he began using the water for the travertine operation in 1975, the water was still used for irrigation of the 90 acres. After the water was used in the travertine plant, it was directed to the fields to be used for irrigation. In approximately 1978, Mr. Orser sold the travertine operation to the Strong family and moved from the area. (Testimony of John Orser and Department file.)

7. There is no record that an Application to Change Appropriation Water Right was filed with the Department to change the use of water from irrigation to industrial use for the travertine plant in 1975. (Testimony of Scott Compton and Department records.)

8. The Strongs filed a Statement of Claim for 60 gallons per minute up to 48.51 acre-feet of water per year from Eagle Creek for industrial use. The priority date claimed is December 31, 1919. The claimed period of use is from January 1 through December 31.

9. Applicants own the proposed place of use. (Testimony of Ronald Dodson and Department file.)

10. There are no water rights or other planned uses or developments for which a permit has been granted or for which water has been reserved that would be adversely affected by the proposed change. (Department file and records.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Mont. Code Ann. Title 85, chapter 2, part 3 (1989).

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 2 and 3.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria, set forth in Mont. Code Ann. § 85-2-402(2) (1989), are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to (85-2-436) that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The use proposed by the Applicants, domestic, is a beneficial use. The amount requested is within the Department's guidelines for irrigating one acre of lawn and garden. Instead of 30 gallons per minute requested in the Application, Applicant would appropriate at a flow rate of 10.00 gallons per minute.

See Findings of Fact 4 and 5.

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5. The proposed use would not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which a reservation has been granted. See Finding of Fact 10.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4 and 5.

7. Applicants have possessory interest in the proposed place of use. See Finding of Fact 9.

8. Applicant has not presented adequate evidence to support his claimed historic uses from Eagle Creek. Mr. Orser did not stop using the water from Eagle Creek for irrigation when he started the travertine operation, rather the travertine use was additional to the irrigation use. See Findings of Fact 6, 7, and 8.

9. While the Department has no authority to make a final determination on the scope of existing water rights, it must have evidence establishing the existence of a claimed right before it can authorize a change of that right. Otherwise a water right which has never existed could serve as the basis of a new operation, while retaining an old priority date. See In re Application G40605-410 by Crumpled Horn.

The Department must make preliminary administrative findings on water rights in order to perform its mandated function of authorizing or denying applications for change of water rights. See In re Applications G05081- and G05083- by Moldenhauer (1984);



In re Applications 26722-76LJ, 26723-76LJ, 26718-76LJ, 26719-76LJ, and 26720-76LJ by Meadow Lake Country Club Estates (1981);  
Whitemore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944);  
United States v. District Court of Fourth Judicial District, 121  
Utah 18, 242 P.2d 774 (1952).

One of the determinations that the Department must make in change proceedings is the existence of the right for which the application for change has been made.

Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect [sic] to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructary interest only, and accords the appropriator no privileges by way of the ownership of the corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some specified purpose. A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings. (Citations omitted.) Meadow Lakes, supra, Proposal for Decision, August 25, 1981, at 56.

To hold otherwise would allow any holder of a purported water right to circumvent the permitting process for new uses by utilizing change proceedings to enlarge the amount of water that actually had been used, or even to initiate a use that had never existed except on paper. See 79 Ranch v. Pitsch, 40 St Rep. 981, 666 P.2d 215 (1983); In re Applications 49623-41H, G120401-41H, and G120403-41H by Estate of Lena Ryen (1985).

Here, Applicant has not shown the existence of a water right for the travertine operation. Mr. Orser testified he had

continued to irrigate the 90 acres in addition to the water use in the travertine plant in 1975. Clearly the travertine plant water use was an additional water use. After July 1, 1973, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the Department. Mont. Code Ann. § 85-2-302(1) (1989).

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter the Hearing Examiner makes the following:

PROPOSED ORDER

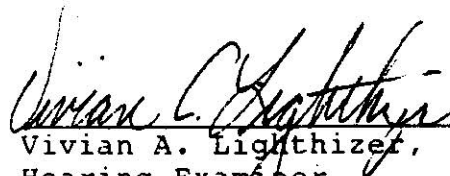
Application for Change of Appropriation Water Right G(W)194810-43B is hereby denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 18<sup>th</sup> day of February, 1993.

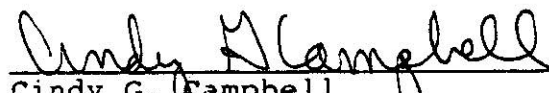
  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 18<sup>th</sup> day of February, 1993, as follows:

Ronald and Donna Dodson  
P.O. Box 22  
Gardiner, MT 59030

Scott Compton, Manager  
Bozeman Water Resources  
Regional Office  
111 N. Tracy  
Bozeman, MT 59715  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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